



UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office

Washington, D.C. 20231

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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/331,554 08/23/99 ROUSSEL

E HER0033

HM12/0709

EXAMINER

ANTHONY NIEWYK
BAKER & DANIELS
111 EAST WAYNE STREET
SUITE 800
FORT WAYNE IN 46802

AFREMOVA.V
ART UNIT PAPER NUMBER

1651


DATE MAILED:

07/09/01

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Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Advisory Action	Application No. 09/331,554	Applicant(s) Roussel et al.	
	Examiner Vera Afremova	Art Unit 1651	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED May 10, 2001 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid the abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

THE PERIOD FOR REPLY [check only a) or b)]

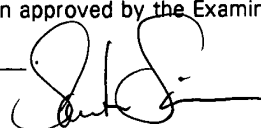
- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ In view of the early submission of the proposed reply (within two months as set forth in MPEP § 706.07 (f)), the period for reply expires on the mailing date of this Advisory Action, OR continues to run from the mailing date of the final rejection, whichever is later. In no event, however, will the statutory period for the reply expire later than SIX MONTHS from the mailing date of the final rejection.

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☒ A Notice of Appeal was filed on May 10, 2001. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☒ The proposed amendment(s) will be entered upon the timely submission of a Notice of Appeal and Appeal Brief with requisite fees.
3. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search. (See NOTE below);
- (b) ☐ they raise the issue of new matter. (See NOTE below);
- (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without cancelling a corresponding number of finally rejected claims.

NOTE:

4. ☐ Applicant's reply has overcome the following rejection(s):
5. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment cancelling the non-allowable claim(s).
6. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because:
see attached.
7. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
8. ☒ For purposes of Appeal, the status of the claim(s) is as follows (see attached written explanation, if any):
- Claim(s) allowed: none
- Claim(s) objected to: none
- Claim(s) rejected: 13-32
9. ☐ The proposed drawing correction filed on _____ a) ☐ has b) ☐ has not been approved by the Examiner.
10. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____
11. ☐ Other:



SANDRA E. SAUCKIER
PRIMARY EXAMINER

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Attachment to Advisory Action

Applicants' arguments and proposed amendments to the claims filed 5/10/2001 have been fully considered but they are not persuasive for the reasons of record as explained in the final rejection mailed 2/07/2001 and for the reasons below.

Applicants' arguments are directed to the idea that the cited patents US 4,379,170 [A] and/or US 5,573,947 [B] are silent with regard to the use of propionibacteria which are capable of releasing a physiologically significant amount of nitric oxide into human or animal digestive tract (see response page 4, par. 2, lines 4-7 and page 4, par. 5, lines 1-3). This is not convincing because identical bacteria (*Propionibacterium* sp., *Propionibacterium acidipropionici* or *Propionibacterium freudenreichii*) and/or identical bacterial strains (P20, CNRZ 81, CNRZ 89, CNRZ 277, NCDO 1072, CNRZ 86, CNRZ 80 and LS 2502) at identical amounts (10^9 cells per gram) are used in food products as claimed and as disclosed. Thus, the ability of releasing a physiologically significant amount of nitric oxide into human or animal digestive tract by identical amount of identical bacteria is an inherent characteristic of the applicants' compositions and method for making composition/food product. Or the amounts of nitric oxide are reasonably expected to be released in identical, if not similar, physiological amounts as claimed and as disclosed particularly in view that denitrifying bacteria including propionibacteria used in cheese industry are known to release nitric oxide as intermediate product during reduction of nitrates as taught by the cited reference by Balows et al. [U].

No claims are allowed.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Vera Afremova whose telephone number is (703) 308-9351. The examiner can normally be reached on Monday to Friday from 9:00 to 5:30.

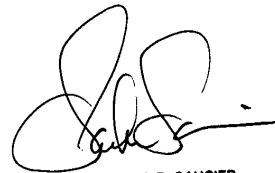
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn, can be reached on (703) 308-4743. The fax phone number for this Group is (703) 308-4242.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-0196.

Vera Afremova,

Art Unit 1651

July 5, 2001.



SANDRA E. SAUCIER
PRIMARY EXAMINER